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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of KIERSTIN A. and
MARK LEE SMITH.

KIERSTIN A. SMITH,

Respondent,

v.

MARK LEE SMITH,

Appellant.

E047535

(Super.Ct.No. SBFSS58771)

OPINION

APPEAL from the Superior Court of San Bernardino County. Duke D. Rouse, Judge. (Retired judge of the San Bdno. Sup. Ct., assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Affirmed.

Law Offices of Pittullo Howington, Barker & Abernathy and Joseph W. Howington for Appellant.

Law Office of H. William Edgar, H. William Edgar; Graves & King, Patrick L. Graves and Dennis J. Mahoney for Respondent.

I. Introduction

Kierstin A. Smith (Wife) and Mark Lee Smith (Husband) terminated their marriage in 2001 with judgment entered in 2003. Spousal and child support and custody issues have been frequently considered by the family law court since that time. Husband appeals from the family court's order establishing the amount of child support and awarding Wife attorney's fees. We find no abuse of discretion and affirm the judgment.

II. Factual and Procedural Background

A. 2005-2007

Wife and Husband were married in August 1994, separated in May 2001, and obtained a judgment terminating the marriage in June 2003. They share equal custody of two children born in 1997 and 1999. Husband was initially required to pay spousal support of \$2,500 per month, which was reduced to \$1,500 and was terminated as of October 1, 2006. The court established child support at \$3,173 per month in August 2005.

Judge Duke D. Rouse presided over the case until October 2008. In November 2005, Husband initiated these proceedings seeking a modification of custody, visitation, and support. Wife asked that all orders remain the same.

In 2007 the family court heard the issues of child custody and visitation. At that time the court entered an interim order setting forth custody and visitation for the children, including holidays and summer visitation, transportation of the children, travel, and miscellaneous provisions. No ruling was made regarding support issues.

In June 2007, Wife listed her monthly income as \$2,658.

In July 2007, Husband filed an additional income and expense declaration with a monthly income of \$18,000 and a supplemental declaration about Wife's income, claiming she had additional income of \$1,792. In August 2007, the court ordered a discovery sanction of \$12,000 against Husband.

B. 2008 Proceedings

In April 2008, both parties filed updated income and expense declarations and trial briefs on the issues still remaining for the court's consideration based on Husband's 2005 application. Husband listed his last month's income as \$13,887 and his average monthly income as \$17,310. Wife listed her last month's income as \$4,822 and her average monthly income as \$3,250. In her trial brief, Wife represented her monthly income to be \$2,768 a month and Husband's monthly income to be about \$44,000 a month. She asked for an increase in child support and for attorney's fees. Husband asked the court to order child support based on the parties' actual incomes and for sanctions, expert fees, and attorney's fees.

The hearing was conducted for five days in April and June 2008.

During the hearing, the parties presented comprehensive and conflicting evidence and testimony about the parties' respective incomes. Husband's income derived primarily from a printing company and a printing brokerage company, California Printing Solutions, Inc. and Allstate Instant Printing, Inc., which did business mainly with new car dealerships.

On behalf of Wife, Stephen Zamucen, a certified public accountant, testified that he prepared an analysis of Husband's cash flow. Husband's monthly cash flow was

\$27,070 for 2005, \$42,072 for 2006, \$44,605 for 2007, and \$33,586 for January and February 2008.

On behalf of husband, Karen Kaseno, also a certified public accountant, testified that Husband's monthly cash flow was \$23,027 or \$32,027 for 2005, \$28,059 or \$37,059 for 2006, \$26,047 for 2007, and \$9,660 or \$13,647 for the first three months of 2008.

Kaseno testified that, in addition to wages, Wife had other possible sources of monthly income of \$6,693 for 2006 and \$3,045 for 2007, which included a vehicle, gas, car and health insurance, and a cell phone provided by her parents and worth \$21,486 annually.

Husband testified that his income for January, February, and March 2008 was \$13,647 per month. His entire income between January 1, 2008, and June 10, 2008, was \$78,427 (about \$13,071 a month). He also testified the reduction in his monthly income between 2007 and 2008 was caused by sales representatives leaving and starting their own businesses and the loss of income of about 40 percent from a decline in auto industry business. He also testified that he used a motor home for both business and family purposes.

Wife testified that her parents twice gave her a Christmas gift of \$10,000. In 1994, her parents gave her a vehicle for which they pay the cost of gas and insurance. Her father also pays for her health insurance. In 2008, Wife was working two part-time jobs teaching at Riverside Community College, the equivalent of one full-time job. She had applied for a full-time position at Chaffey College. She possessed one master's degree and was one class short of obtaining a second master's degree.

The parties submitted their written final arguments in August 2008. Wife argued the court should attribute monthly income of \$40,838 to Husband based on a weighted average for the years 2005 through 2007. Even using Kaseno's figures, the weighted average would be \$38,278 monthly average income. Wife claimed she had incurred attorney's fees of \$85,000, including \$12,000 in sanctions, compared to Husband's fees of \$150,000. Wife asked for a reasonable fee award of \$70,000 and costs of \$20,000.

Husband argued the court should base the child support award for 2007 on Husband's income of \$24,402 and Wife's income of \$5,250. For 2008, Husband argued child support should be based on Husband's income of \$9,660 and Wife's income of \$5,250. He sought credit for overpayment of child support. He opposed any award of attorney's fees to Wife.

In summary, the evidence of the parties' monthly incomes for 2007 ranged between \$2,658 and \$5,250 for Wife and \$18,000 and \$44,605 for Husband. For 2008, the monthly range for Wife was between \$2,768 and \$5,250 and for Husband was between \$9,660 and \$40,838.

C. The Notice of Ruling, Order After Hearing, and Statement of Decision

On October 6, 2008, the court filed its notice of ruling on order to show cause, signed by Judge Rouse, in which it decided that child support should be awarded retroactively from July 1, 2007. It calculated Husband's monthly income for July through December 2007 as \$44,605, as testified to by Wife's expert, and Wife's monthly income as \$3,491. Based on the guidelines, the court ordered monthly child support of \$4,555 per month for 2007. It calculated husband's monthly income beginning January

2008 as \$35,037 and wife's monthly income as \$4,083. It awarded monthly child support of \$3,698. Under Family Code section 2030, Husband was ordered to pay Wife's attorney's fees in the sum of \$62,300, payable at \$2,000 per month.

Although the trial court ordered Wife's counsel to prepare the statement of decision requested by Husband, ultimately Husband's counsel prepared an order after hearing and a proposed statement of decision that was filed with the court on November 20, 2008. A different judge, Tara Reilly, signed the order after hearing and the statement of decision, which were both filed on December 14, 2008.

The order after hearing is almost exactly the same as the court-prepared notice of ruling. The statement of decision, as prepared by Husband's counsel, explains that the trial court's calculation of income for both 2007 and 2008 was based upon an average of the years 2005 through 2007. It further asserts that the trial court did not consider husband's testimony that there was "a downturn trend in the automotive industry." As to the 2008 period, the court heard testimony that Husband's monthly cash flow was \$9,660. The trial court did not consider Husband's actual income during 2008 as a basis upon which to establish his income. Instead, the trial court relied upon the testimony of Wife's expert and rejected Husband's assertion that his cash flow had been reduced because of the economy.

The statement of decision acknowledged that there was "a downtrend in the economy and its effect on [Husband's] income and cash flow," which would make it difficult for him to pay Wife's attorney's fees, but affirmed the order anyway.

III. Analysis

The three principal issues involve Husband's income, Wife's income, and the award of attorney's fees. The standard of review for orders affecting a child support obligation and a related order for attorney's fees is abuse of discretion. (*In re Marriage of Alter* (2009) 171 Cal.App.4th 718, 730-731; *In re Marriage of Williams* (2007) 150 Cal.App.4th 1221, 1233-1234; *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 282-283; *In re Marriage of Keech* (1999) 75 Cal.App.4th 860, 864, citing *In re Marriage of Cueva* (1978) 86 Cal.App.3d 290, 296.) Substantial evidence must support the trial court's factual determinations and the court must exercise its discretion reasonably. (*Alter* at p. 730.) Legal questions are subject to independent review. (*Id.* at p. 726, citing *In re Marriage of Pearlstein* (2006) 137 Cal.App.4th 1361, 1371-1372.)

A. Husband's Income

In order to obtain a modification of child support, Husband must show a material change of circumstances occurring since the time of the order. (*In re Marriage of Mosley* (2008) 165 Cal.App.4th 1375, 1383-1387.) Husband argues that the reduction of his income is a changed circumstance and the court erred by basing the support order on an average of past income for 2005 through 2007.

In *In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 825, the trial court found that it was an abuse of discretion to determine husband's cash flow based upon trial exhibits and expert testimony showing cash flow in 1996 two years before the trial in 1999. The *Rosen* court found that the trial court abused its discretion because it "based

spousal support upon the erroneous finding that [the husband's] income at the time of trial" was in error and should be recalculated. (*Ibid.*)

The court in *In re Marriage of Riddle* (2005) 125 Cal.App.4th 1075, 1083-1084 observed that longer time samples may be appropriate for measuring "average annual income." On the other hand, a longer period of time "could well have its problems in regard to a salesperson . . . who worked in an industry that traditionally bobs and dips with interest rates, or the economy as a whole (e.g., real estate sales, or, as in the present case, securities sales)." (*Ibid.*)

Subsequently, in *In re Marriage of Mosley*, *supra*, 164 Cal.App.4th at pages 1385-1386, the court commented: "The assumption underlying [the calculation of a parent's annual gross income] is that past income is a good measure of the future income from which the parent must pay support. However, the law recognizes that is not always the case. Thus, the court is given discretion to adjust . . . "the monthly net disposable income figure [if it] does not accurately reflect the . . . *prospective* earnings of the parties at the time the determination of support is made" [Citation.]' [Citation.] . . . [¶] . . . [¶]

"As we said in *In re Marriage of Riddle* (2005) 125 Cal.App.4th 1075, 1081, 'this case is essentially a gloss on Family Code sections 4060 and 4064, the two statutes which deal with the problem of calculating fluctuating income for support orders. The aim of section 4060 is to give a trial court discretion to adjust the annual net adjustable income required for a support order when dividing net disposable income by 12 "does not accurately reflect the actual or prospective earnings of the parties." Section 4064 gives a trial court the authority to adjust a child support order "as appropriate to accommodate

seasonal or fluctuating income of either parent.” While both statutes are framed in discretionary terms, it is also well established that the discretion must be a reasonable one, “‘exercised along legal lines, taking into consideration the circumstances of the parties, their necessities and the financial ability of the [supporting spouse].’” [Citation.]’ (*In re Marriage of Riddle, supra*, 125 Cal.App.4th at p. 1081, fn. omitted.) ‘The theory is that the court is trying to predict *likely* income for the immediate *future*, as distinct from extraordinarily high or low income in the past.’ (*Id.* at p. 1082.) We must be wary of ‘the logical fallacy of extrapolation, in which some series of events in the past is necessarily assumed to continue in exactly the same way into the future.’ (*Id.* at p. 1086.)

“‘Generally, where a trial court has discretionary power to decide an issue, an appellate court is not authorized to substitute its judgment of the proper decision for that of the trial judge. The trial court’s exercise of discretion will not be disturbed on appeal in the absence of a clear showing of abuse, resulting in injury sufficiently grave as to amount to a manifest miscarriage of justice. [Citations.] “‘The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. . . .’” [Citations.]’ (*In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 682, 76 Cal.Rptr.2d 691.)”

In the present case, the court heard evidence about three complete years (2005-2007) and one partial year (2008). Wife’s expert testified to a higher income for 2006 and 2007 than Husband’s expert. But both experts agreed to a decline in income for 2008. Husband testified that the automobile industry was having trouble causing his income to be substantially decreased. He testified that his monthly average income during 2008 was less than his income in the preceding three years. Indeed, he testified

that his monthly income for three months of 2008 was \$13,647. He also testified that between January 2008 and June 2008, his monthly income was \$78,427, or about \$13,071 per month. The court recognized Husband's reduced income for 2008 by reducing the child support order from 2007 to 2008.

Although we understand Husband's argument that the trial court did not credit his testimony about how much his income was reduced, we cannot deem the court abused its discretion. It is obvious the trial court was more persuaded by Wife's expert than Husband and his expert. (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 204.) Furthermore, in awarding less child support beginning in 2008, the court acknowledged the decline in Husband's income and adjusted its award accordingly. The present case differs from *Rosen* in that the family court used an average of the most recent three years, not years from the more distant past. The court also recognized a dip in Husband's income for 2008. Husband may dislike the court's decision but it was hardly beyond the bounds of reason.

B. Wife's Income

Husband also contends that the trial court abused its discretion in its child support orders because it did not recognize Wife had been receiving from her father \$10,000 at Christmas, plus use of a car each year, and payment of gas expenses and automobile and medical insurance.

In *In re Marriage of Alter*, *supra*, 171 Cal.App.4th at page 735, the court observed that "California's child support statutes are designed to ensure that parents take 'equal responsibility to support their child in the manner suitable to the child's circumstances.'"

([Fam. Code,] § 3900.)” Family Code section 4053, subdivision (b) provides that “[b]oth parents are mutually responsible for the support of their children” and that “[e]ach parent should pay for the support of the children according to his or her ability.” (Fam. Code, § 4053, subd. (d).) Family Code section 4058, subdivision (a) provides that “[t]he annual gross income of each parent means income from whatever source derived, . . .” “This definition is broad enough to encompass gifts that bear reasonable relationship to the traditional concept of income as a recurrent, monetary benefit. It is irrelevant that there is no legal obligation on the part of the donor to continue making the gifts or that the flow of cash does not appear on the income tax return.” (*In re Marriage of Alter*, *supra*, 171 Cal.App.4th at p. 736.)

The *Alter* court further observed that “A parent may have income that is not taxable but that would be available for support of the child.” (*Id.* at p. 735.) Additionally, “But while regular gifts of cash may fairly represent income, that might not always be so. Therefore, the question of whether gifts should be considered income for purposes of the child support calculation is one that must be left to the discretion of the trial court.” (*Id.* at p. 737.)

In this case, we cannot say the trial court abused its discretion by not basing child support in part upon the help Wife received from her family. *Alter* involved money gifts made regularly over the course of a decade. Here Wife received two Christmas gifts of \$10,000 and other value from the use of a car and payments for insurance, gasoline, and a cell phone for some period of time. Wife claimed her average monthly income was variously \$2,500, \$2,768, and \$3,250. The trial court determined her income was \$4,083.

Therefore, it appears the trial court did, in fact, attribute additional income to Wife based on benefits supplied by her parents.

Referring to *In re Marriage of Bardzik* (2008) 165 Cal.App.4th 1291, 1294, Wife contends that the burden of proving modification of her circumstances is upon Husband and he failed to provide evidence that she could earn more than she was receiving from her present employment. Wife argues she is now carrying a full teaching load at Riverside Community College and that the vocational consultant could only turn up 11 actual job vacancies in the area. Husband argues that the trial court abused its discretion by not considering evidence from a vocational training consultant, who testified that there were teaching jobs available in Wife's area of expertise and that Wife could earn between \$52,000 and \$63,500 per year. The vocational report, however, also recognized the pending layoffs threatening local teachers in 2008 and 2009. Although Wife is certainly qualified for different teaching positions than she holds presently, there was no real evidence of her ability to achieve a higher-paying job in 2008 or subsequently. It was not an abuse of discretion to give little consideration to this issue.

C. Attorney's Fees

The record on appeal contains little information by which to review the reasonableness of the attorney's fee award to Wife. Although the declarations supporting the award were filed in the lower court, they are not included in the clerk's transcript. We cannot evaluate this issue in the manner described in *Alan S. v Superior Court* (2009) 172 Cal.App.4th 238, 251-259. Error is never presumed on appeal. Husband has the burden of supplying an adequate record, which he has failed to do on this issue.

(*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141; *In re Marriage of Wilcox* (2004) 124 Cal.App.4th 492, 498-499.)

IV. Disposition

The family court determined that beginning in 2008, Husband's monthly income is \$35,037 and Wife's income is \$4,083. Based on the guidelines, the court ordered Husband to pay child support of \$3,698, only \$525 per month more than the 2005 order of \$3,173. Husband pays no spousal support. No abuse of discretion was established. We affirm the child support orders of the family court.

Each party is to bear their own costs.

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s/Richli
J.

We concur:

s/McKinster
Acting P.J.

s/King
J.